Nos. 79-1458 and 79-1459

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

MORGAN GUARANTY TRUST COMPANY OF NEW YORK, PETITIONER

v.

ALTON RINIER, AS AGENT FOR CERTAIN EMPLOYEES OF BANKRUPT, ET AL.

CHARLES G. RODMAN, AS TRUSTEE OF THE ESTATE OF W. T. GRANT COMPANY, BANKRUPT, PETITIONER

v.

ALTON RINIER, AS AGENT FOR CERTAIN EMPLOYEES OF BANKRUPT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Jt. App. 4a-7a)[1] is not yet reported. The opinion of the district court (Jt. App. 9a-21a) is reported at 474 F. Supp. 788. The opinion and order of the bankruptcy judge (Jt. App. 23a-31a) are unreported.

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[1] "Jt. App." refers to the Joint Appendix filed by Morgan Guaranty Trust Company of New York ("Morgan"), petitioner in No. 79-1458, and by Charles G. Rodman, as Trustee of the Estate of W. T. Grant Company, Bankrupt ("Rodman"), petitioner in No. 79-1459. "App." refers to the appendix filed in the court of appeals. The court of appeals initially decided this case by order entered on the day of oral

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1980. The petitions for a writ of certiorari were filed on March 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether claims resulting from the debtor-in-possession's unauthorized abrogation of the severance pay provisions of its collective agreements are entitled to priority as costs and expenses of the administration of a Chapter XI Bankruptcy Act estate.

2. Whether a debtor-in-possession may, without securing the approval of the bankruptcy court, abrogate the terms of a collective agreement negotiated between the debtor and the bargaining representative of its employees when the debtor [in] possession has taken the benefits of the agreement.

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argument (Jt. App. 4a-7a). On motion of the National Labor Relations Board ("Board"), the court of appeals subsequently issued a written opinion, which is identical thereto except for the substitution of the following paragraph in lieu of the first two paragraphs at Jt. App. 5a:

PER CURIAM:

We affirmed by our memorandum order entered January 3, 1980 the judgment of the district court in this case. The National Labor Relations Board thereafter requested that we publish our decision. In accordance with our practice in appropriate cases of publishing previously unpublished decisions or orders of this Court, *Braunstein* v. *Eastern Photographic Laboratories, Inc.*, 600 F. 2d 335 (2d Cir.) (per curiam), *cert. denied*, 411 U.S. 944 (1979); *Continental Stock Transfer and Trust Co.* v. *SEC*, 566 F. 2d 373, 374 n. 1 (2d Cir. 1977) (per curiam), we now publish the following opinion in the instant case which incorporates in substance our memorandum order of January 3, 1980.

STATUTES INVOLVED

Section 64a of the Bankruptcy Act, 11 U.S.C. (1976 ed.) 104(a), is set forth in the petitions (Morgan Pet. 3-4; Rodman Pet. 3-4). Also relevant is Section 313(1) of the Bankruptcy Act, 11 U.S.C. (1976 ed.) 713(1), which provides:

> Upon the filing of a petition the court may * * *
>
> (1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;

STATEMENT

1. W. T. Grant Company ("Grant") filed a Chapter XI reorganization petition on October 2, 1975. Thereafter, Grant operated as a debtor-in-possession until April 13, 1976, when the reorganization was superseded by a liquidating bankruptcy proceeding. When the Chapter XI petition was filed, Grant had approximately 75,000 employees, about 3,500 of whom were covered by 53 collective bargaining agreements, which provided for the payment of severance benefits to eligible employees in the event of involuntary termination.[2] Grant never sought permission of the bankruptcy court to reject any of these agreements pursuant to Section 313(1) of the Bankruptcy Act, 11 U.S.C. (1976 ed.) 713(1).

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[2]The precise amount of the payment depends upon the employee's length of service and his weekly salary at the date of termination (Jt. App. 11a).

Early in the Chapter XI proceeding, Grant announced its unilateral decision to discontinue the payment of severance benefits.[3] During the administration of the Chapter XI proceeding, Grant terminated numerous employees in circumstances entitling them to severance pay under the collective bargaining agreements. Grant made no severance payments to these employees (Jt. App. 11a-12a, 23a-24a). The Board participated in the bankruptcy proceeding as a creditor. See *Nathanson* v. *NLRB*, 344 U.S. 25 (1952).

2. Petitioner Rodman, who was appointed trustee after Grant had been adjudged bankrupt, applied to the bankruptcy court for instructions concerning the disposition of former employees' severance pay claims.[4] The bankruptcy court held that severance pay claims of employees discharged during the aborted Chapter XI proceeding are entitled to priority as costs and expenses of that proceeding (Jt. App. 25a-29a). The district court and the court of appeals both affirmed (Jt. App. 9a-21a; 4a-7a).

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[3]Grant erroneously indicated to its employees that the Bankruptcy Act prohibited such payments without court authorization, stating that "it is your Management's hope that this prohibition can be lifted at some time during 1976" (App. 293), and that the "Company is developing a plan for the payment of Termination or Incentive Pay, in connection with the store closings, but such plan will be subject to the approval of the Bankruptcy Court" (*id.* at 292).

[4]At most, $2 million are in controversy (see Morgan Pet. 7 n.*). That amount is approximately .3% of the $650 million claimed by petitioner Morgan and the other banks that it represents.

The court of appeals found that "Grant received benefits under [the collective bargaining] contracts by permitting the workers to continue in its employ after it entered Chapter XI" (Jt. App. 5a), and it held that Grant's "posting notices in its stores that it was discontinuing the severance pay benefits" (*ibid.*) was insufficient to reject its collective bargaining agreements because "only a formal rejection pursuant to § 313(1) of the Bankruptcy Act * * * is sufficient to disaffirm an executory contract" (Jt. App. 6a). The court also held "that the entire portion of the employees' severance pay claims is entitled to first priority as costs and expenses of administration" (*ibid.*).

ARGUMENT

1. In *Straus-Duparquet, Inc.* v. *Local Union No. 3 International Brotherhood of Electrical Workers*, 386 F. 2d 649, 651 (2d Cir. 1967), the Second Circuit held that collective bargaining agreement severance pay claims, based on employee discharges during a Chapter XI administration, are entitled to the first priority under Section 64a(1) of the Bankruptcy Act—as "costs and expenses of administration"—even though part of the employment period upon which the claims are based preceded the initiation of the reorganization proceeding. The court held that the discharge date is decisive because severance pay, unlike wages, "is not earned from day to day and does not 'accrue' so that a proportionate part is payable under any circumstances" (386 F. 2d at 651). In *In re Public Ledger*, 161 F. 2d 762, 773 (3d Cir. 1947), the Third Circuit had reached the opposite conclusion, holding that only that portion which accrued during the Chapter XI proceeding is entitled to priority if the amount of severance pay is conditioned upon the length

of an employee's service.[5] In *In re Mammoth Mart, Inc.*, 536 F. 2d 950, 953 (1st Cir. 1976), the First Circuit agreed with the Third Circuit.[6]

Petitioners urge (Morgan Pet. 2, 8-9, 13-17; Rodman Pet. 8, 18-20) that this Court should grant certiorari to resolve this conflict. We acknowledge the existence of this conflict, as did the court below (Jt. App. 6a-7a). We do not believe that certiorari is warranted, however, because this conflict no longer presents a question of general importance.

The Bankruptcy Code of 1978 ("the Code"), 11 U.S.C. App. (Supp. II) 101 *et seq.*, prospectively repeals the Bankruptcy Act and controls all bankruptcy proceedings that were filed on and after October 1, 1979. Section 507(a)(3) of the Code, 11 U.S.C. App. (Supp. II) 507(a)(3), expressly grants a third priority position to severance pay earned during the 90 days preceding the filing of the petition or the cessation of the business,

[5]However, the court held that severance pay which "moves to all employees regardless of length of service * * * [would] be wages wholly earned and accrued under the trustees' management and, therefore * * * entitled to priority." *In re Public Ledger, supra*, 161 F. 2d at 771.

[6]The claims in *Mammoth Mart* did not involve a collective bargaining agreement. Indeed, the First Circuit suggested that if employees were induced to remain on the job by the debtor-in-possession's representations that severance pay would be paid based on the prior practice, such pay might be entitled to a Section 64a(1) priority because "[t]hen the consideration supporting [the employees'] claims would be the services performed subsequent to the debtor-in-possession's promise." *In re Mammoth Mart, supra*, 536 F. 2d at 955 n.4.

whichever occurs first.[7] While this provision is not dispositive of how severance pay should be calculated where it is an expense of administration, the obligation having ripened during the Chapter XI period,[8] the congressional determination that severance pay should be treated as a form of wages provides a significantly changed statutory context for deciding this question under the new Code. In sum, determination of that issue under the old Act no longer presents a question of continuing importance, and this case presents no occasion for determining that issue under the new Code.

2. Petitioners also contend (Rodman Pet. 9, 16-17)[9] that certiorari should be granted to resolve a conflict between the Second and Ninth Circuits on whether a debtor's collective agreement obligations may be assumed

[7]Section 507(a)(3) of the Code provides:

> The following expenses and claims have priority in the following order: * * *
>
> (3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay—
>
> (A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
>
> (B) to the extent of $2,000 for each such individual.

This provision replaces Section 64a(2) of the Act, 11 U.S.C. (1976 ed.) 104(a)(2), which accorded a second priority to:

> wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding * * *

[8]Section 507(a)(1) of the Code, 11 U.S.C. App. (Supp. II) 507(a)(1), continues to afford first priority to expenses of administration.

[9]Morgan adopts Rodman's argument in this regard (Morgan Pet. 4 n.*).

by conduct or only when approved by the bankruptcy court. That alleged conflict does not require the granting of certiorari in this case, however, because both circuits agree that obligations under an agreement must be met if, as here, the debtor-in-possession or receiver has accepted the benefits of the agreement, regardless of the presence OR absence of bankruptcy court approval.

In *Local Joint Executive Board, AFL-CIO* v. *Hotel Circle, Inc.*, 613 F. 2d 210 (9th Cir. 1980) (Jt. App. 33a-48a), the debtor-in-possession and receiver both operated under a collective agreement that had been negotiated by the debtor. The receiver renegotiated the agreement and paid the employees accordingly, but without seeking the bankruptcy court's approval. Thereafter, the receiver petitioned the bankruptcy court to allow him to reject the collective agreement and thereby facilitate the sale of the business (Jt. App. 33a-34a). The Ninth Circuit affirmed the decisions of the district court and the bankruptcy judge relieving the debtor from the collective agreement. Contrary to the Second Circuit's view, the Ninth Circuit held that a debtor-in-possession or receiver could not bind the debtor's estate to a collective agreement without the permission of the bankruptcy court (Jt. App. 40a-43a, 48a n.5). However, the Ninth Circuit indicated that it would require the debtor-in-possession or receiver to meet any obligations it had incurred under a collective agreement where, as here, he had taken the benefits thereof (Jt. App. 42a-43a). In sum, both the Ninth and Second Circuits agree that, in the circumstances presented here, the debtor-in-possession or receiver would have to meet any obligations incurred while operating under the collective

agreement, regardless of whether the bankruptcy court had previously approved the agreement.[10]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[10]Even if a conflict existed, which it does not, that conflict would lack general importance in light of the adoption of the new Code. Whereas Section 313(1) of the Bankruptcy Act, 11 U.S.C. (1976 ed.) 713(1), speaks only of "rejection of executory contracts," Section 365(a) of the Code, 11 U.S.C. App. (Supp. II) 365(a), provides that "the trustee, subject to the court's approval, may *assume or reject* any executory contract * * *" (emphasis added). See also Section 365(d)(2) of the Code, 11 U.S.C. App. (Supp. II) 365(d)(2).

DOJ-1980-05